

OLMSTEAD, THE SUPREME COURT & YOU:

by Stephen Gold, Esq.

1. THE ADA REGULATIONS, PRE-OLMSTEAD:

"A PUBLIC ENTITY *SHALL* ADMINISTER SERVICES, PROGRAMS AND ACTIVITIES IN THE MOST INTEGRATED SETTING APPROPRIATE TO THE NEEDS OF QUALIFIED INDIVIDUALS WITH DISABILITIES." 28CFR§35.130(d) (THE "INTEGRATION MANDATE") THIS IS THE DISCRIMINATION!

"A PUBLIC ENTITY *SHALL* MAKE REASONABLE MODIFICATIONS IN ITS POLICIES, PRACTICES, OR **PROCEDURES WHEN MODIFICATIONS ARE NECESSARY TO AVOID DISCRIMINATION.** UNLESS ... MODIFICATIONS WOULD FUNDAMENTALLY ALTER THE NATURE OF THE SERVICE, PROGRAM OR ACTIVITY." 28 CFR §35.130(b)(7)

2. WHAT DID THE SUPREME COURT SAY?

A. THE ADA IS A FUNDAMENTAL CIVIL RIGHTS STATUTE!

B. THE COURT ACKNOWLEDGED THAT CONGRESS FOUND THAT DISCRIMINATION AGAINST PEOPLE WITH DISABILITIES INCLUDES SEGREGATION, ISOLATION AND INSTITUTIONALIZATION.

C. UNDER ADA, A LEGAL RIGHT TO BE SERVED IN MOST INTEGRATED SETTING. NOT OPEN TO STATE'S DISCRETION.

D. UNNECESSARY ISOLATION AND INSTITUTIONALIZATION IS DISCRIMINATION AND REQUIRES COMMUNITY PLACEMENT, IF:

* "STATE'S TREATMENT PROFESSIONALS" HAVE DETERMINED COMMUNITY PLACEMENT APPROPRIATE FOR SPECIFIC INDIVIDUALS;

* TRANSFER TO THE COMMUNITY IS NOT OPPOSED BY "AFFECTED INDIVIDUAL;"
AND

* COMMUNITY PLACEMENT CAN BE "REASONABLY ACCOMMODATED, TAKING INTO ACCOUNT RESOURCES AVAILABLE AND NEEDS OF OTHER PEOPLE WITH.... []"

E. WHAT JUDGMENTS DID SUPREME COURT SAY SHOW THAT "UNJUSTIFIED INSTITUTIONAL ISOLATION... IS A FORM OF DISCRIMINATION"?

** "INSTITUTIONAL PLACEMENT OF PERSONS WHO CAN HANDLE AND BENEFIT FROM COMMUNITY SETTINGS PERPETUATES UNWARRANTED ASSUMPTIONS THAT PERSONS SO ISOLATED ARE INCAPABLE OR UNWORTHY OF PARTICIPATING IN COMMUNITY LIFE."

** "CONFINEMENT IN AN INSTITUTION SEVERELY DIMINISHES THE EVERYDAY LIFE ACTIVITIES OF INDIVIDUALS, INCLUDING FAMILY RELATIONS, SOCIAL CONTACTS, WORK OPTIONS, ECONOMIC INDEPENDENCE, EDUCATIONAL ADVANCEMENT, AND CULTURAL ENRICHMENT."

3. COURT SAID "THE REASONABLE-MODIFICATIONS STANDARD WOULD BE MET,," IF STATE HAS-

- A "COMPREHENSIVE. EFFECTIVELY WORKING PLAN FOR PERSONS [IN COMMUNITY],
AND

- A WAITING LIST THAT MOVED AT A REASONABLE PACE NOT CONTROLLED [BY THE STATE]... TO KEEP INSTITUTIONS FULLY POPULATED •

4. "FUNDAMENTAL ALTERATIONS" ALLOW STATE:

- TO "MAINTAIN A RANGE OF FACILITIES
AND

- TO ADMINISTER SERVICES WITH AN EVEN HAND...."

5. OUR CHALLENGE-

- * TO BUILD A GRASS ROOTS MOVEMENT TO DEAL WITH THE COURT'S "REASONABLE MODIFICATIONS" AND "FUNDAMENTAL ALTERATIONS" CRITERIA OLMSTEAD IS ONE BATTLE IN THE STRUGGLE.

6. TO MEET OUR CHALLENGE,

- WE MUST HAVE AN *OVERALL & COORDINATED STRATEGY*. THE STATES HAVE THEIR STRATEGY; WE MUST HAVE A STRATEGY THAT INCLUDES:

- UNDERSTANDING OUR STATE'S SYSTEMS, PROGRAMS & HOW THEY ACTUALLY WORK.

- A LEGAL COMPONENT
 - > YES, MORE LAWSUITS

- A POLITICAL COMPONENT
 - > MEET WITH YOUR STATE FOLKS; ARE THEY RESPONSIVE?
 - > WHO ARE OUR NON-ELECTED ALLIES?
 - > IDENTIFY ALLY ELECTED OFFICIALS

- DIRECT ACTIONS
 - > COALITIONS
 - > "A" DISABILITY COMMUNITY?
 - > "A" DISABILITY MOVEMENT?
 - > IDENTIFY BY NAME PERSONS WHO WANT OUT!

6. WHO IS COVERED BY OLMSTEAD?

PERSONS WITH:.

- > MENTAL ILLNESS
- > DEVELOPMENTAL DISABILITIES
- > PHYSICAL DISABILITIES
- > COGNITIVE DISABILITIES

7. WHAT INSTITUTIONS ARE COVERED??

- > STATE HOSPITALS FOR MENTALLY ILL
- > STATE CENTERS FOR D.D.&ICFs
- > NURSING HOMES FOR ANYONE
- > OTHERS

8. COURT AGREED PEOPLE WITH DISABILITIES SHOULD NOT BE UNNECESSARILY INSTITUTIONALIZED. THEREFORE, TO AVOID DISCRIMINATION, STATES MUST "PHASE DOWN" ITS INSTITUTIONS, THOUGH NOT NECESSARILY "PHASE THEM OUT."

- OLMSTEAD SHIFTED THE QUESTION FROM "SHOULD PEOPLE WITH DISABILITIES LIVE IN THE COMMUNITY" TO "HOW AND WHEN TO PROVIDE PROGRAMS AND SERVICES IN THE COMMUNITY."

9. THE STATE'S PLAN & OUR PLAN:

- DOES YOUR STATE HAVE A WRITTEN PLAN, LET ALONE A "COMPREHENSIVE, EFFECTIVELY WORKING" PLAN. TO MOVE PEOPLE FROM INSTITUTIONS INTO THE COMMUNITY?

> IS THERE A WRITTEN PLAN FOR PEOPLE TO MOVE INTO THE COMMUNITY FROM NURSING HOMES?

FROM ICFs?

FROM DD CENTERS?

- > HAS STATE IDENTIFIED PEOPLE WHO "COULD BE" IN THE COMMUNITY?
- > EVEN IF STATE HAS A RELEVANT PLAN, IS THERE AN ADMINISTRATIVE MECHANISM TO ENSURE PEOPLE ARE MOVED INTO THE COMMUNITY?
- > IF STATE HAS MADE ASSESSMENTS, WERE PEOPLE JUDGED 'NOT READY' FOR COMMUNITY BECAUSE NO COMMUNITY PLACEMENT CURRENTLY AVAILABLE? A FLAWED PROCESS.
- > STATE PROFESSIONALS MAY NOT BE KNOWLEDGEABLE ABOUT SERVICES NOW AVAILABLE IN COMMUNITY.
- > HOW DID STATE DETERMINE THE PERSON NOT COMPETENT TO MAKE A DECISION? PRESUME IT?
- > DID STATE TRY TO FIND REASONS A PERSON WAS NOT APPROPRIATE FOR COMMUNITY, RATHER THAN LOOK AT WHAT PERSON NEEDED.
- > WHEN STATE ASKED PERSONS IN INSTITUTIONS IF THEY WANTED TO LIVE IN COMMUNITY, DID STATE FRIGHTEN RESIDENTS ABOUT BEING HOMELESS? SHOW RESIDENTS OTHER PERSONS NOW LIVING IN THE COMMUNITY? HOW WAS AN INFORMED CHOICE/DECISION MADE?

- STATE'S PLAN SHOULD BE LIKE A "DESEGREGATION" PLAN, AFFIRMATIVELY MOVING PEOPLE OUT OF UNNECESSARILY ISOLATED INSTITUTIONS. DON'T LET BUREAUCRATS OBFUSCATE THE ISSUE!

- FOR A STATE TO HAVE A "COMPREHENSIVE, EFFECTIVELY WORKING" PLAN, YOUR STATE MUST BE ABLE TO ANSWER AND IDENTIFY:

> WHO- BY EACH INDIVIDUAL'S NAME -WANTS COMMUNITY PLACEMENT?

- DO THE STATE'S TREATING PROFESSIONALS' KNOW ABOUT THE POTENTIAL RANGE OF COMMUNITY OPTIONS? WITHOUT SUCH KNOWLEDGE, NOT A 'PROFESSIONAL' JUDGMENT.

- HAS STATE ASKED EACH PERSON?

- WHO IS THE "AFFECTED" PERSON? A GUARDIAN CANNOT ABRIDGE THE CIVIL RIGHTS OF THE INSTITUTIONALIZED PERSON.
 - HANDS-ON MODEL OF WHAT THE COMMUNITY OPTION IS?
 - HAS DISABILITY COMMUNITY BEEN INVOLVED IN IDENTIFYING PEOPLE? IN WRITING THE PLAN? IN ASSESSING NEEDS FOR COMMUNITY SERVICES FOR DIFFERENT DISABILITIES? IN TALKING TO EACH PERSON INSTITUTIONALIZED?
 - DO YOU TRUST YOUR STATE TO IDENTIFY DISABLED FOLKS WITHOUT OUT THE DISABILITY COMMUNITY'S PARTICIPATION AND INVOLVEMENT?
 - > WHAT SPECIFIC COMMUNITY SERVICES DOES EACH PERSON REQUIRE AND HOW MUCH WILL THEY COST?
 - HOW MANY HOURS? WHAT TYPE OF HOUSING? AVAILABLE TRANSPORTATION?
 - WITHOUT A DOLLAR FIGURE, NO WAY PRECISELY TO COMPARE COSTS.

 - > WHEN WILL THOSE SPECIFIC COMMUNITY BASED SERVICES BE AVAILABLE?
 - WHAT IS THE TIME LINE?
 - > HOW WILL THE SERVICES BE FUNDED?
 - "SHOW US THE MONEY." WITHOUT A SPECIFIC BUDGET REFERENCE, THE STATE IS NOT FOR REAL.
 - > WHO WILL DEVELOP THE COMMUNITY SERVICES OR HOW WILL THEY BE PROVIDED?
 - "EFFECTIVELY WORKING" IS THE OPPOSITE OF AN AMORPHOUS FANTASY.
 - > IS THERE MONEY ALLOCATED AND REALLY AVAILABLE FOR EACH PERSON?
 - WHERE IS IT?

 - A PLAN IS SPECIFIC. IT IS NOT A POLICY, A HOPE, A FORMER PRACTICE, AN IDEA IN AN ADMINISTRATOR'S HEAD.

 - THE SUPREME COURT DID NOT WANT DUMPING AND NEITHER DO WE. BUT WE DO DEMAND A REAL "COMPREHENSIVE, EFFECTIVELY WORKING PLAN."

 - WHAT OTHER CRITERIA TO ASSESS STATE'S PLAN?
 - > ONE PROGRAM? ONE DISABILITY? MANY OR ALL DISABILITIES?
 - > ONLY PERSONS ACTUALLY INSTITUTIONALIZED? WHAT ABOUT PERSONS AT "IMMINENT RISK"?
 - > CAN STATE HAVE A PLAN FOR ONE DISABLED GROUP AND NOT PEOPLE WITH OTHER DISABILITIES?
 - > CAN STATE HAVE A PLAN FOR ONE GROUP AT A TIME?
 - > WHAT'S BEST FROM ADVOCATE'S VIEWPOINT?
 - > HOW DOES PLAN RELATE TO FUNDS?
 - > MUST A STATE AS PART OF AN EFFECTIVE PLAN APPLY FOR OR EXPAND HOME & COMMUNITY-BASED WAIVERS? PERSONAL CARE OPTION?
 - > IF A STATE DOES NOT EITHER APPLY FOR A WAIVER OR EXPAND EXISTING WAIVERS SO PEOPLE INSTITUTIONALIZED CAN LIVE IN THE COMMUNITY, IT'S HARD FOR THE STATE TO CRY "UNREASONABLE MODIFICATION," OR 'COST.' REMEMBER, THE STATE'S PLAN - WITH WAIVERS - CAN CONSOLIDATE INSTITUTIONS TO SAVE FUNDS AND REDUCE COSTS.
 - > IS A "PROGRAM" - PEOPLE WITH SAME DISABILITIES OR SOMETHING ELSE?

 - HOW SOPHISTICATED MUST THE DISABILITY COMMUNITY BE REGARDING AN EFFECTIVE PLAN?
- DO NOT GET BOGGED DOWN ON POLICY WONKNESS! THE STATE IS DISCRIMINATING AND THE STATE OFFICIALS MUST DEVELOP A PLAN THAT WE AGREE WITH!

> OUR JOB IS STOP DISCRIMINATION, TO IDENTIFY PEOPLE WHO WANT OUT, AND TO GET THEM OUT-YESTERDAY!

10. WAITING LISTS ARE PERMISSABLE, BUT THEY MUST MOVE PEOPLE INTO THE COMMUNITY AT A REASONABLE PACE?

- THE SUPREME COURT WAS CONCERNED THAT PLAINTIFFS VIA LAWSUITS WOULD "JUMP" OVER OTHER PEOPLE [NON-LITIGANTS] WHOM THE STATE HAS IDENTIFIED AS APPROPRIATE FOR THE COMMUNITY AND GONE THROUGH THE NECESSARY STEPS FOR COMMUNITY PLACEMENT.

> BEFORE THERE CAN BE "JUMPING," A STATE MUST HAVE A SPECIFIC PLAN AND HAVE ALREADY IDENTIFIED SPECIFIC PEOPLE "IN LINE" WITH A SPECIFIC 'NUMBER' FOR COMMUNITY PLACEMENT.

> IT'S LIKE THE OLD BAKERIES - "OK, WE'VE PLACED NUMBER 57 IN THE COMMUNITY, WHO IS NUMBER 58?"

> HAS YOUR STATE IDENTIFIED EACH PERSON AND THEN GIVEN PEOPLE THEM THEIR "NUMBER TO FREEDOM?"

- A STATE'S WAITING LIST MUST BE REAL AND MUST MOVE AT A "REASONABLE PACE."

> V WHAT IS A "REASONABLE PACE?" NONE OF MAJORITY ON THE SUPREME COURT SUPPORTED LONG TERM, UNNECESSARY INSTITUTIONALIZATION, BUT THE COURT STATED NO CONCRETE CRITERIA

> IF DIFFERENT PLANS, DIFFERENT PACES DEPENDING ON WHAT NEEDS TO BE DONE?

> ADVOCATES MUST LOOK AT WHAT REALLY HAS TO HAPPEN TO MOVE A PERSON OR GROUP OF PERSONS INTO THE COMMUNITY, NOT JUST ACCEPT WHAT THE STATE SAYS.

> ONE SUGGESTED STANDARD FOR "REASONABLE PACE- IF I, OR MY CHILD, WERE THE PERSON UNNECESSARILY INSTITUTIONALIZED, HOW QUICKLY WOULD I WANT THE PACE TO MOVE?

> ANOTHER SUGGESTED STANDARD FOR "REASONABLE PACE"- ASK THE STATE OFFICIAL IN CHARGE, IF S/HE WOULD LIVE IN THAT INSTITUTION FROM FRIDAY AFTER WORK UNTIL MONDAY MORNING? WOULD THAT SPEED UP THE PACE?

> HOW QUICKLY HAS STATE DONE IT IN PAST? THERE IS NO NEED TO REINVENT A PROCESS.

> WHAT REASONS [EXCUSES] DOES THE STATE GIVE FOR WHY THE PACE IS SO SLOW?

> WHAT HAS STATE DONE TO ELIMINATE THOSE EXCUSES AND SPEED IT UP THE PROCESS?

- DO NOT ACCEPT BUREAUCRATIC EXPLANATIONS OR EXCUSES. REMEMBER, IT IS A VIOLATION OF THE CIVIL RIGHTS OF PEOPLE WITH DISABILITIES TO BE SEGREGATED, ISOLATED, AND UNNECESSARILY INSTITUTIONALIZED.

- OTHER CONSIDERATIONS REGARDING A REASONABLY PACED WAITING LIST:

> IS THERE ONE WAITING LIST FOR EVERY PERSON WITH A DISABILITY? OR ARE THERE SEVERAL WAITING LISTS, ONE FOR PERSONS IN NURSING HOMES, ONE FOR PERSONS IN ICFs? ETC.

> THERE PROBABLY IS NO ONE MAGIC PACE THAT FITS ALL DISABILITIES, ALL STATES OR ALL INSTITUTIONS?

> WHAT SHOULD BE THE CRITERIA TO EVALUATE THE REASONABLE PACE?

> "REASONABLE PACE" MUST BE LOOKED AT IN CONTEXT WHETHER THE STATE HAS REALLY MADE EVERY EFFORT REASONABLE. FOR EXAMPLE, HAS STATE APPLIED FOR MORE FUNDS? INCREASED ITS HOME AND COMMUNITY BASED WAIVERS, WHICH THE COURT RECOGNIZED WERE AVAILABLE.

> THE DISABILITY COMMUNITY SHOULD DETERMINE WHAT IS REASONABLE AND PRESSURE TO SPEED UP THE PROCESS. OUR LIVES, LIBERTIES AND HAPPINESS DEPEND ON OURSELVES. "NOTHING ABOUT US WITHOUT US."

- REMEMBER, THE SUPREME COURT SEEMS TO HAVE ACCEPTED A REASONABLE PACE TO BE "A SHORT TIME UNTIL A BED [OR ATTENDANT] IS AVAILABLE "WE CAN SPEED UP THE AVAILABILITY OF APPROPRIATE COMMUNITY PROGRAMS.

11. STATES ARE ALLOWED TO MAINTAIN A "RANGE OF SERVICES" AND TO ADMINISTER SERVICES "WITH AN EVEN HAND."

> BUT DOES YOUR STATE TRULY HAVE AN EVEN HANDED RANGE OF SERVICES?

> IF THERE IS AN INSTITUTIONAL BIAS OF \$ ALLOCATION, THE STATE DOES NOT HAVE AN EVEN HAND OF SERVICES. LOOK AT THE STATE'S BUDGET!

> BOTH THE RANGE OF SERVICES AND EVEN HAND DEFENSES MUST TAKE INTO ACCOUNT WHAT UNNECESSARILY INSTITUTIONALIZED PEOPLE WANT, NOT WHAT STATE HAS HAD IN PAST THAT IS DISCRIMINATORY.

> LOOK AT WHERE YOUR STATE'S MONEY IS NOW GOING & COMPARE WHETHER THE BUDGET IS "EVEN" BETWEEN THE COMMUNITY AND INSTITUTION. DO NOT ACCEPT THE DISCRIMINATORY "THAT'S THE WAY THINGS HAVE BEEN."

> LOOK AT DISCRIMINATION OVER A NUMBER OF YEARS. HOW QUICKLY IS STATE MOVING TO ELIMINATE THE DISCRIMINATION. AT THE PRESENT RATE OF EITHER EVEN HANDED OR MAINTAINING A RANGE, BY WHAT YEAR WILL EVERYONE WHO IS APPROPRIATE TO LIVE IN THE COMMUNITY BE THERE?

> IF THERE IS NOT A MEANINGFUL "RANGE OF SERVICES" BECAUSE OF AN INSTITUTIONAL BIAS, MAINTAINING THIS RANGE WILL PERPETUATE THE DISCRIMINATION.

> DOES YOUR STATE HAVE A FULL RANGE OF SERVICES THAT OFFER A REAL CHOICE, OR ARE THE SERVICES LOP-SIDED - BY HOW MUCH - IN FAVOR OF INSTITUTIONS?

- DOES NOT "EVEN HANDED" INCLUDE PERSONS IN IMMINENT RISK OF BECOMING UNNECESSARILY ISOLATED AND THEREFORE DISCRIMINATED AGAINST?

> DID NOT THE ADA AND COURT INTEND TO PREVENT DISCRIMINATION THAT COULD BE PREVENTED OR ONLY ELIMINATE WHAT EXISTS?

- DOES NOT "MAINTAIN A RANGE" RELATE ONLY TO INSTITUTIONS WHO "NEED" THEM?

> HOW DOES "MAINTAIN A RANGE" RELATE TO NEED FOR EVENHANDED TREATMENT?

- IF STATE CAN CONSIDER COMPETING NEEDS OF OTHERS, WHOSE NEEDS? ONLY PEOPLE WITH SAME DISABILITIES? ANYONE WITH ANY DISABILITY?

- THE STATE MUST AFFIRMATIVELY PROVE THAT ITS PROGRAMS AND SERVICES, AS REFLECTED IN ITS ALLOCATION OF RESOURCES, ARE EVEN HANDED AND ENSURE A FULL RANGE OF SERVICES.

12. A FUNDAMENTAL ALTERATION DEFENSE [I.E., RANGE OF SERVICES AND EVEN HANDED] REQUIRES REVIEWING ALL "AVAILABLE RESOURCES".

- A STATE MUST EXPLORE EVERY AVAILABLE MEANS AND RESOURCES TO AVOID NEEDLESS INSTITUTIONALIZATION.

> AVAILABLE RESOURCES ARE NOT LIMITED TO THOSE ALREADY IN THE COMMUNITY SYSTEM.

- THE ENTIRE BUDGET FOR THE STATE'S "PROGRAM" IS AT ISSUE, BECAUSE THE FUNDAMENTAL ALTERATION DEFENSE APPLIES TO THE ENTIRE "PROGRAM, SERVICE, OR ACTIVITY" AT ISSUE.

- > DOES YOUR STATE HAVE A BUDGET "SURPLUS?" WHY IS IT NOT "AVAILABLE?"

- WHAT RESOURCES HAS STATE NOT APPLIED FOR OR USED THAT MIGHT BE AVAILABLE.

- > "AVAILABLE" DOES NOT MEAN WHAT IS IN THE BANK, BUT WHAT IS POTENTIALLY THERE, BY REALLOCATING FROM ONE POCKET TO ANOTHER, OR FROM HCFA.

- > WHAT'S THE POT? ONLY THE SAME SOURCES OF FUNDS? APPLY FOR NEW FUNDS? ASK LEGISLATURE FOR NEW FUNDS?

- > IS THE ENTIRE STATE BUDGET AVAILABLE? OR ONLY THE LONG TERM CARE BUDGET? OR ONLY THE INSTITUTIONAL BUDGET? THOSE ITEMS LIMITED TO MENTAL RETARDATION? OR MENTAL ILLNESS?

- > THE COURT MUST HAVE ASSUMED THAT A STATE WOULD HAVE TO MOVE FUNDS. OTHERWISE, THE PAST DISCRIMINATION WOULD JUST CONTINUE!

- A STATE MUST CONSIDER SECURING ADDITIONAL FUNDS FOR COMMUNITY PLACEMENTS, INCLUDING REALLOCATING INSTITUTIONAL BUDGETS, MAXIMIZING MEDICAID REIMBURSEMENTS (INCLUDING EXPANDING WAIVERS AND OFFERING OPTIONAL SERVICES), AND SECURING ADDITIONAL APPROPRIATIONS.

- ALTHOUGH SUPREME COURT DID NOT MENTION IT, TITLE II HAS NO "UNDUE COST" BURDEN.

13. "FUNDAMENTAL ALTERATIONS" WILL BE YOUR STATE'S CRY AND SHOUT.

- REMEMBER, IT'S MORE THAN JUST AN ALTERATION. ANY CHANGE IS NOT SAME AS FUNDAMENTAL ALTERATION.

- IT'S ONLY A *FUNDAMENTAL* ALTERATION OF "A PROGRAM" THAT'S A DEFENSE.

- > DEFINING WHAT IN THE PROGRAM IS CRITICAL.

- > "A PROGRAM" IS THE ENTIRE LONG-TERM CARE SERVICES, THE ENTIRE MENTAL HEALTH PROGRAM (BOTH INSTITUTIONS AND COMMUNITY), ETC. THEREFORE, GIVEN SUCH BREADTH, IT IS VERY HARD FOR A STATE TO ARGUE WHAT YOU PROPOSE IS A FUNDAMENTAL ALTERATION.

- WHAT IF PROVIDERS BALK AT THE PROPOSED PLAN? NOT A FUNDAMENTAL ALTERATION. SHOULD THEY EVEN BE PART OF PROCESS?

- IF INTEGRATION SAVES MONEY- SHORT TERM AND/OR LONG TERM, ANY FUNDAMENTAL ALTERATION DEFENSE AVAILABLE?

- > MUST THE SAVING BE FROM THE SAME BUDGET LINE?

14. YOUR STATE WILL RAISE A COST DEFENSE, WITHOUT ANY DOUBT.

- SUPREME COURT DID NOT IDENTIFY WHEN IT WOULD BE TOO COSTLY.' THE BIG FIGHT WILL BE DETERMINING HOW MUCH COST IS TOO MUCH.

- NO QUESTION THAT STATE CANNOT REFUSE TO ENACT "COST NEUTRAL" REFORMS. BUT REMEMBER THAT COURT DID NOT REQUIRE THAT ELIMINATING DISCRIMINATION BE "COST NEUTRAL."

- > A STATE MUST CONSIDER SAVINGS IN DOWNSIZING OR CLOSING INSTITUTIONS. THIS IS PARTICULARLY APPLICABLE IF ONE GROUP OF RESIDENTS WERE PLACED IN COMMUNITY AND AN EQUAL NUMBER OF INSTITUTIONAL BEDS CLOSED.
- > WHAT IS THE RELEVANT TIME FRAME?
- > HOW DO "TRANSITIONAL COSTS" FIT IN?
- COST DEFENSE IS NOT AN ISSUE FOR PERSONS IN NURSING HOMES, BECAUSE TITLE XIX IS AN "ENTITLEMENT" FOR WHOEVER IS ELIGIBLE.
- > PERSON ELIGIBLE FOR AND STATE MUST PROVIDE EITHER NURSING HOME OR COMMUNITY.
- > COST NEUTRAL FROM STATE'S PERSPECTIVE.
- YOUR STATE MUST IDENTIFY BOTH THE SPECIFIC PEOPLE WHO WANT OUT AND EXACT SERVICES THEY NEED. WITHOUT THESE, A STATE HAS NO COST DEFENSE, BECAUSE IT DOES NOT KNOW THE COSTS.
- BEFORE THE STATE CAN ASSERT A COST DEFENSE, DETERMINE IF STATE HAS DONE A FEASIBILITY STUDY, INCLUDING COST, TO PROVIDE NEEDED COMMUNITY SUPPORTS TO THOSE PEOPLE UNNECESSARILY IN INSTITUTIONS.
- > COST SHOULD BE LIMITED TO THOSE SPECIFIC PEOPLE WHO WANT TO LIVE IN COMMUNITY AND TO THE SPECIFIC SERVICES THEY REQUIRE.
- WHAT COSTS: "NET" INCREASED COST? WHAT ITEMS HAVE TO BE INCLUDED, E.G., INSTITUTIONAL MORTGAGES, TRANSPORTATION?
- IF PERSONS WITH DISABILITY HAVE AN ENTITLEMENT TO SERVICES, COST SHOULD NOT BE CONSIDERED BECAUSE STATE IS ALREADY LEGALLY OBLIGATED TO PROVIDE ENTITLEMENT [ICF AND NH] SERVICES TO ALL ELIGIBLE PERSONS. COST OF PROVIDING COMMUNITY SERVICES IS NOT AN "INTEGRATION COST," BUT A COST ATTRIBUTABLE TO VIOLATION OF MEDICAID LAW.
- HOME AND COMMUNITY BASED MEDICAL ASSISTANCE WAIVERS ARE BY STATUTORY DEFINITION "COST NEUTRAL." WE SHOULD USE THIS TO OUR ADVANTAGE.
- IF STATE HAS LEGAL DUTY TO PROVIDE COMMUNITY SERVICES, INDEPENDENT OF ADA, WHY SHOULD COST DEFENSE BE PERMISSIBLE?

"POWER CONCEDES NOTHING WITHOUT A STRUGGLE." FREDERICK DOUGLAS.